NO. 2572

IN THE

# United States Circuit Court of Appeals

FOR THE

# Ninth Circuit

G. J. BUCHLER,
*Appellant,*

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a corporation,
*Appellees.*

# Appellee Black's Brief

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.



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## STATEMENT OF CASE.

The statement of facts is very fully and fairly set forth in the opinion of Honorable Judge Neterer in his opinion. (Tr. 75-78.) We hereby refer to the same and make it a part hereof.

In view of the very one sided and as we think unfair statement contained in appellant's brief we call attention to the facts as shown by the records as follows:

The appellant, complainant below, instituted this suit for himself alone and nowhere in his Bill of Complaint alleges that he brings it in behalf of "other stockholders" as stated in appellant's statement. (Tr. 3, Par. 1 of Complaint, Tr. 4, Pr. VII.) in which he specifically states he seeks to "redress wrongs committed against him." (Bottom of Tr. 4.) The action is brought to have the title of Black and Bell, purchasers of the property of the corporation at a receiver's sale, impressed with a constructive trust.

The Sunset Copper Mining Company was a corporation organized under the laws of Washington, and is named as a party defendant, but it was never served and made no appearance in the lower Court. It was not made a party to this appeal and no citation was issued against it, and neither the trustees nor shareholders were made parties.

The corporation had a board of five trustees (Tr. 8, Par. XIII), Black being one. Bell was never a trustee except for one day many years before the things complained of in the Bill of Complaint. (Tr. 76, 109.) W. H. Baldwin was the dominating influence in the corporation. (Tr. 76, 100.)

Baldwin and four of the trustees resided in New York. Black was the only resident of Washington. The relations between Black and the four eastern trustees were some-

what strained, at least there was some friction between them. (Tr. 99, 100.) The same was true as to Black and Bell. (Tr. 102, 108, 110.) The only time Black and Bell entirely agreed "was the night before the sale" when they agreed upon the price to be bid for the property. Both were creditors and both were evidently attempting to protect their claims. (Tr. 110.)

Complainant made no attempt to comply with Equity Rule 27 and there is no evidence that either Bell or Black had exercised any influence over the officers or Board of Trustees of the corporation (Tr. 78), and no allegation was made in the Bill that any demand was ever made upon the officers of the corporation to do anything to protect appellant or other stockholders and there is not even a hint in the evidence as to any reason why this was not done.

The corporation in 1904 and 1905 had secured loans from Ellen C. Baldwin amounting to $29,384.10 which it used in improving its property. (Tr. 102) The company gave her mortgages to secure this sum which were assigned to Bell. (Appellant's Brief, 4., Tr. 107).

In 1907 Bell threatened to foreclose these mortgages unless the other stockholders would pay their proportion of the money to do the assessment upon the mining property to enable the Company to hold the mining claims. Black was opposed to foreclosure and went to New York where he met Bell and threatened to fight the foreclosure and make the foreclosure proceedings very expensive for Bell unless he would give Black a reasonable time, which was understood to be about a year, in which to take care

of the mortgage debt. This delay was finally agreed upon. (Tr. 102, 108.)

Black was unable to provide for the payment of the mortgage during the year. (Tr. 109.) Bell then prepared and sent to all the stockholders of the company, including the appellant, a circular setting forth the condition of the company, the approximate amount of the debts, the fact that there was no money with which to do assessment work or obtain patents upon its mining claims, and that the company was in danger of losing its property, offering on his part to advance his pro rata if other stockholders would also do this (Tr. 109.) (Circular Tr. 152, 154.) and calling attention to the fact that a receivership was threatened. He received not over $70.00 and returned this small sum.

When Bell found that Black could not raise money to protect the company's holdings and the stockholders would not and Black having promised that he would not make it expensive if Bell would delay a year to enable Black to raise money to save the company's holdings, he wrote to Black asking him to give him the name of some attorney who would act as his attorney with as little expense as possible. Black sent him the names of several attorneys among them being Mr. Sandidge, whom Bell had met. Bell then employed Sandidge as his attorney. (Tr. 109.) Black did not retain Sandidge as stated in appellant's Brief P. 6, but suggested Sandidge among others who would not be expensive. (Tr. 109.) Bell then started his action in the Superior Court alleging among other things the nature and kind of property held by the com-

pany, the necessity of doing the assessment work in order to hold the mining claims and the danger of the loss of property and set out the notes and mortgages securing the same, and the fact that the Company was wholly insolvent bringing the case in accordance with Rem. & Bal. Code for Washington (Sec. 741, Sub. 5.) And he prayed for the appointment of a receiver with power to sell the property to pay the indebtedness. (Tr. 115, 118) Bell also set up facts sufficient to authorize the foreclosure of his mortgages if for any reason the receiver was not appointed with full power to sell property. Black was a trustee at this time and was also a large creditor, having advanced large sums to enable the Company to save its property. (Tr. 102, 103, 139, 148, 149.) Black was also at that time Judge of the Superior Court of the county in which the mining property was located and in which the action had to be commenced. Evidently for these reasons the summons and complaint were served upon the president of the Company who acknowledged in writing that "due and timely" service was made upon the corporation, which writing was filed in the Superior Court. (Tr. 119.) At the same time a notice of the application for a receiver was served upon the president of the corporation. He acknowledged "due and timely service" as to this notice. (Tr. 121.) At the same time an affidavit of Bell for the appointment of a receiver was likewise served upon the president who also acknowledged "due and timely" service. (Tr. 124.) All of these proceedings were in compliance with the laws of Washington with reference to an application for a receiver.

The notice of the application for a receiver named

Dec. 9, 1908, "or as soon thereafter as counsel could be heard" as the time of the application (Tr. 121.), not simply Dec. 9, 1908, as stated in appellant's brief, P. 5.

Black being interested in the litigation could not hear the action. Judge A. W. Frater of the Superior Court of Seattle heard the matter and appointed J. B. Fogarty Receiver. (Tr. 126, 127.) The order names him as "Receiver" not temporary Receiver, as erroneously stated in appellant's Brief, P. 6. Black saw Fogarty and asked him if he would act. (Tr. 97.) He consented, took his oath, filed his bond, and entered upon his duties. (Tr. 127, 128, 129.) His appointment was confirmed and made permanent by another decree. (Tr. 132.) Black knew the facts and knew of no defense. He was, however, a trustee, and Judge of the Superior Court and also a creditor. Black evidently for the purpose of avoiding any criticism that might arise if the Company had no attorney and as an act of precaution employed an attorney, D. W. Locke, to defend for the Company. He employed Locke several weeks before the trial. (Tr. 96.) Locke says he looked after the matter just as carefully as any other case that was put in his hands. He examined the proceedings and looked up the records. Tr. 95.) He then made a formal appearance (Tr. 130) and appeared at all the further numerous hearings. (Tr. 130, 131, 150, 165.)

Appellant in his Brief, P. 6, states that Locke made but one appearance, yet while the transcript does not purport to set forth all the orders and hearings had in the Superior Court the transcript shows four appearances by Locke for the corporation. In addition to the several general appearances made by Locke as attorney for the

defendant Sunset Copper Mining Company, Nicholas Rudebeck and L. F. Reid, stockholders, made general appearance in said action, making among other things objections to the sale of the property and also to the confirmation of the sale (Tr. 97, 150, 151, 158, 159), appearing by several firms of attorneys. Reid appeared "for himself and for other stockholders" (Tr. 159.) as did also Rudebeck. (Tr. 141.)

The property was sold on March 20, 1909, to Black and Bell for $40,000.00 being more than $24,000.00 less than the indebtedness. Appellant had knowledge of the pendency of the action, of the condition of the Company, of the sale to Black and Bell before the confirmation and the amount of the bid, and was at all times informed as to the affairs of the Company; was in correspondence with attorneys; knew of the appearance of Reid for stockholders before the confirmation; knew it was necessary to expend large sums in order to keep title to the property, yet waited more than three years after the sale while Black and Bell were expending about $25,000.00 upon the property after the sale, not including attorney's fees, before he began this action. (Tr. 78, 103, 104, 105, 173, 174, 176, 179, 187.)

During the progress of the action from Dec. 1908 to April 5, 1909, by reason of Black being interested in the action he could not act as Judge. It was very difficult to get judges to sit in his place as at that time of the year all were busy. Judges were called in from time to time to hear the matters, the actual obtaining of the Judges being made by the Court stenographer. (Tr. 106.) When

no Judge could be secured a Judge Pro Tempore was agreed upon by the attorneys in the action and approved by Judge Black in pursuance of Rem. & Bal. Code of Wash., Vol I., Sec. 40. He was not selected by Judge Black as stated in appellant's Brief, but "approved" as the law required.

When appellant began his action he claimed the Superior Court proceedings were void and he prayed that the proceedings and judgment in the Superior Court be declared to be void, but afterward he waived this claim and amended his Bill of Complaint by striking out that portion of the prayer. (Tr. 23.)

While in the Bill of Complaint it was alleged that the notes and mortgages executed in favor of Ellen C. Baldwin were "fraudulent" and that the bid of $40,000.00 was "absurdly low" and that Bell and Black and others "conspired," "confederated" and were in a "collusive scheme" and made free use of these and other like terms he introduced no evidence tending to sustain a single controverted allegation in the Bill.

They proved that the notes were given for cash paid to the Company to the full amount named in the notes and that this cash was used by the Company in developing its mining claims. (Tr. 102.) The only evidence as to the value of the property was the fact that Black and Bell bid $40,000.00. Instead of proving that Bell and Black and others "conspired" together to injure the Company they proved that there was friction between them and that the only persons who protected the property or attempted to do so were Black and Bell and that they advanced large

sums to do assessment work when appellant and all other stockholders, after being begged to do so, had absolutely refused to contribute (Tr. 109), and that only after the refusal he brought an action so that the property could be sold to pay its debts.

Prior to the time Bell brought his action in the Superior Court appellant obtained an option on the stock, notes and mortgages held by Bell but was not able to sell it. (Tr. 104, 105, 106, 109.) When appellant found he could not sell the Bell holdings he urged Bell to foreclose the mortgage, buy in the property and let appellant sell it. He not only asked Bell to do this but asked Black to consent to this. Both Bell and Black refused to comply with his request. This was before Bell sent out his circular asking stockholders to contribute pro rata to save the property. (Tr. 106, 109, 152.)

When Bell brought proceedings to have the property sold to pay the debts without agreeing to appellant's terms, appellant did nothing to prevent the sale or to protect the property. After Bell and Black had purchased the property on a bid of $40,000.00 and the sale had been confirmed they offered to allow stockholders to share in that bid pro rata. (Tr. 110.) Appellant did not avail himself of this opportunity although the offer was kept open, and at the trial in the U. S. District Court Bell renewed the offer. (Tr. 110.) Appellant was present at the trial and testified, and did not deny any of these facts. (Tr. 103.) He then waited for more than three years after the sale to Bell and Black and until after they had done the necessary assessment work, caused the claims to be surveyed,

made an application for patent, paid the government for the land and until after every expense connected with obtaining title had been incurred and paid by Black and Bell before he brought this action in equity.

Upon the trial the U. S. District Court dismissed appellant's action. He appeals therefrom.

## POINTS

### I.

The assignments of error by appellant are too broad and general and not sufficiently specific to warrant the Court in noticing them. This applies to each, all and every of them, but especially as to numbers VII., VIII., IX., X., XI., and XII.

### II.

The Sunset Copper Mining Company is an indispensable party to the action. No service having been made upon it and it not having appeared it was not a party and the District Court rightfully dismissed the action.

### III.

If it be claimed that after the sale of all of its property the corporation became defunct then the trustees of the corporation are indispensable parties and the suit was rightfully dismissed.

### IV.

Appellant is estopped from claiming that the corporation was defunct as in the Bill of Complaint appellant described it as a corporation and named it as a defendant and alleges in his Brief herein that it is a corporation.

V.

The District Court rightfully dismissed the action under rule 27 of New Equity Rules.

VI.

Appellant cannot be allowed to claim that the proceedings in the Superior Court were null and void, first, because the appellant in the United States District Court voluntarily amended his prayer in his Bill of Complaint so as to show he was making no such claim. Second, because it is inconsistent with the prayer to have appellees declared trustees for the benefit of stockholders and at the same time declare that they have no title. A party cannot be heard to deny or impeach the title of another in property upon which said party seeks to impress a constructive trust as against that other.

VII.

The Superior Court had jurisdiction of the original action, first, because the president of the corporation was served with summons and complaint. Second, because the president of the corporation by writing filed in said cause solemly admitted "due and timely service," and thus solemnly waived any additional service. Third, because the corporation made a general appearance by its attorney. Fourth, because stockholders for themselves and for all other stockholders appeared in the action. Fifth, because the Superior Court found that due and legal service was made upon the defendant corporation and the presumption of law is that it had jurisdiction at least in the absence of proof to the contrary. The transcript of the evidence fails to show that the service shown in transcript is the only service made upon the corporation.

VIII.

The findings of fact made by the trial judge in his decision and unobjected to by appellant and not assigned as error by appellant and therefore binding upon him support the trial judge's decision below in dismissing the bill and therefore this appeal should be dismissed, irrespective of the errors assigned by appellant.

IX.

Black and Bell, each having been shown to have been undisputed bona fide creditors of the Sunset Copper Mining Compayn, had a right to purchase the property at a receiver's sale to protect their claims, regardless of any official relation that they, or either of them, might sustain towards said corporation. Bell, in addition, had no connection with the corporation.

X.

That the appellant is guilty of laches so marked in character as to both justify a court of equity in denying him relief and to require such a court to dismiss the bill. He waited more than three years before bringing his action, delaying while appellees necessarily spent more than Twenty-five Thousand Dollars in improving and protecting the property. The appellant had knowledge of the sale at the time and knowledge that it was necessary to spend large sums to preserve the title and had knwoledge that the Company was insolvent.

XI.

The questions presented to this Court are all *res adjudicata*, in that they were presented and determined by

the Superior Court of the State of Washington in and for the County of Snohomish, in the suit of Frank L. Bell against the Sunset Copper Mining Company, and also upon objections made and presented to said Court to the sale of the property of said mining company by the receiver, and to the confirmation of such sale by the Court, said objections being made by a stockholder for himself and for all stockholders similarly situated.

XII.

That before the complainant can have a decree from a Court of Equity the appellees, Black and Bell, must be placed in *statu quo*, and the appellant, through his counsel, and in open court, has manifested an unwillingness to so place the said appellees, and is seeking to impose upon the property a further burden of large attorney fees, together with the expenses of a receivership, and seeks to have that made a first lien upon the property, notwithstanding the existing priorities of Black and Bell as undisputed, bona fide creditors of said corporation. But appellees cannot be put in *statu quo*. Appellees' valid claims amount to more than One Hundred Thousand Dollars, with interest, and the property is not worth more than Forty Thousand Dollars. Any decree in favor of the appellant would be profitless to any stockholder in the corporation and therefore a vain and idle act upon the part of the Court.

XIII.

Appellant brought this action for himself alone and not on behalf of other stockholders. He has made it simply his personal action and has not brought it for himself and other stockholders.

XIV.

The appeal should be dismissed for the reason that the Sunset Copper Mining Company is a necessary party to this appeal and it appears that the corporation is not made a party and it was not served with notice of this appeal and no citation was sued out or served upon said corporation.

XV.

The original action brought by Bell was primarily an action to have a receiver appointed with power to sell the property as provided by the laws of Washington.

XVI.

There is no equity in favor of appellant or any other stockholder.

XVII.

The appellant has no remedy other than, or different from, that which is available, to the corporation itself, namely: To appear in the original action and ask leave to have the judgment therein opened and permission to come in and defend.

XVIII.

The complainant himself invited appellee Bell to foreclose the mortgage, and acquire title to the property in order that the appellant might become a purchaser thereof from Bell; he solicited appellee Black to use his influence to procure appellee Bell to foreclose the mortgage, and he is estopped by such solicitation to complain of the sale of the property to satisfy the indebtedness.

XIX.

The appellant's claim is stale.

XX.

The evidence wholly fails to show that the appellees, Black and Bell, have failed in the performance of any duty owed by them, or either of them, to the corporation, or that they, or either of them, were guilty of any acts or conduct inconsistent with their relationship to the Sunset Copper Mining Company.

XXI.

All the evidence shows the equities are upon the side of appellees.

## ARGUMENT AND AUTHORITIES

### POINT I.

It seems to us too clear for argument that the assignments of error 7, 8, 9, 10, 11 and 12 are too general and are not at all specific. Any error could be predicated upon these broad general assignments. As to the other assignments of error if the Court did err in any or all of them it is only an error as to his reasons for dismissing the action. If the Court did err in holding there was no collusion between Black and Bell that would not be sufficient for a reversal because if the proper parties were not made defendants or if appellant did not comply with the rules of the Court or if his evidence showed no equity in favor of himself in any way or if appellees could not be put in *statu quo* or if upon the whole appellant was not wronged or if the Court could see that the stockholders would not be benefitted by holding Black and Bell as trustees the

Court ought to dismiss the action. The same reasoning is applied to II., III., IV., V and VI.

It seems self evident to us that a mere inspection of assignments of error 7, 8, 9, 10, 11 and 12 will show that these assignments are not specific. We think the Court should not take notice of these assignments, but on this rule should dismiss the appeal.

Grape Creek Coal Co. vs. Farmers Loan etc., 12 C. C. A., 350.

Doe vs. Waterloo Min. Co., 17 C. C. A., 190.

Andrews vs. National Foundry & Pipe Works, 25 C. C. A., 110.

Columbus Safe Deposit Co. vs. Burke, 32 C. C. A., 67.

Rule 4, Circuit Court of Appeals, Sec. 2.

## POINTS II., III. AND IV.

We prefer to combine our arguments as to these three points because they are merely different phases of the same point and we think that the mere statement of the points ought to be sufficient.

> "Where the object of the action is to prevent or redress a wrong to the corporation, the corporation itself is an indispensable party either as plaintiff or defendant."
>
> 10 Cyc. 995, Sub. 2.

In an action, the object of which is to restore to the corporation assets which its directors and officers have

unlawfully converted to their own use, the corporation itself is certainly an "indispensable party."

10 Cyc., 996, B.

Porter vs. Sabin, 149, U. S. 473, 478.

Whitney vs. Fairbanks, 54 Fed., 985.

Dickerman vs. Northern Trust Co., 176, U. S., 181, 188.

"Where the contest may be between shareholders and third persons the corporation is a necessary party."

10 Cyc., 996, 997.

If there is no process upon the corporation nor a voluntary appearance the suit must be dismissed.

10 Cyc., p. 997, Sub. V.

Counsel for appellant when the action was commenced recognized this principle of law and named the corporation as a party defendant. It was not served with any process and made no appearance in the action. There is nothing in the record, in the decision of the lower Court, or otherwise, to indicate that the Sunset Copper Mining Company was ever served with any process or that at any time it appeared in the action. It can hardly be claimed that in the absence of some decree of the Court or reference by the Court or the records that it was served, that the presumption would be that it was properly served. As a matter of fact it never was served nor did it appear and nowhere in the record is there a hint that it was served. Where a necessary party has been omitted the objections may be taken on appeal. (2 Cyc., p. 687, Sub.

B.) As the corporation was named as a party defendant this objection could not be taken by either answer or demurrer, as appellees had a right to assume that being named as a party it would be duly and properly served. It may be claimed, however, that after Bell and Black had purchased all of the property of the Company that it became defunct. In view of the records we can see no foundation for this claim as in the Bill of Complaint the Sunset Company is described as a corporation organized under the laws of the State of Washington. In the decision of the lower Court it was found that it was then a corporation. In appellant's brief, page 6, he still describes it as an existing corporation. The laws of the State of Washington provide that when a corporation shall be dissolved the trustees of such corporation shall hold title to the property. The language of the statute is as follows:

> " * * * and it shall thereupon be dissolved and the trustees of the corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate Court proceedings."
>
> Vol 2, Rem. & Bal. Code 3715 d.

So that in that case the trustees of the company, of which there were five, held the title and it is certainly clear that if for any reason the corporation had become defunct the owners of the equitable title must be parties to the action. Aside from the statute this must either be the trustees or the shareholders. It seems to us too clear for argument that the Sunset Copper Mining Company was an indispensable party defendant and that if it

was not served with process and did not appear it was not a party by the mere naming of it in the Bill of Complaint as a defendant. It is equally clear that if the corporation were defunct that either the trustees or the shareholders, the holders of the equitable title, should have been made party defendants in this sort of an action. It not being made a real party the lower Court should have dismissed the action for that reason if for no other. It is true the learned Judge did not give that for his reason for dismissing the action, but it is too well settled for argument that where a Court dismisses an action and gives the wrong reason yet if there were a proper reason why it should have been dismissed, the judgment must stand.

## POINT V.

Nowhere in the Bill of Complaint is there any allegation that the appellant, before bringing his action, made any demand upon the officers or trustees of the Sunset Copper Mining Company to take any steps to redress the wrongs complained of and there is not the slightest hint in the evidence that there was any excuse for not doing so. The corporation had a board of five trustees (Tr. 8, Bill of Complaint, paragraph XIII.), Black being one of the trustees. Bell was a trustee only for one day in 1904. (Tr. 76, 109.) The dominating influence in the corporation was W. H. Baldwin and four trustees who resided in New York. (Tr. 76, 99, 100.) There always appeared to be some friction between Black and Bell and the Eastern trustees. (Tr. 99, 100, 102, 108, 110.) There is not a word of testimony in the transcript which tends to show any different relation existing between Black and Bell and

the other trustees. Unless the evidence is entirely ignored it cannot be claimed that the president of the corporation and the four trustees might not have been willing to bring an action against Bell and Black if there was any occasion therefor and it was appellant's duty under the rule and under the authorities aside from the rule to have made a demand upon the president or the other trustees of the corporation before bringing this action. It is true that in the Bill of Complaint appellant if not directly stating, at least makes such allegations from which it might be inferred that Black and Bell were the dominating influences in the corporation and by fraud deprived the corporation of its property, but in the evidence there is not a single word or line of testimony that indicates this, but on the contrary the proof is clear that Bell never was a trustee except for one meeting years before the happening of the things complained of by appellant and that Black, while a trustee was only one of five and that at least Black did not dominate the affairs of the Company. He was the only Washington trustee and seemed to be fighting for the minority stockholders against the Eastern officers and stockholders.

The action was rightfully dismissed by the District Court under Equity Rule 27.

Hawes vs. Oakland, 104 U. S., 450.

Macon D. M. S. R. Co., vs. Shayler, 141 Fed., 585.

Edwards vs. Merc. Trust Co., 124 Fed., 38.

## POINTS VI. AND VII.

We treat both VI. and VII. together in this argument.

The transcript shows that the president of the corporation was served with summons and complaint and also was served with notice of the application for the appointmen of a receiver. (Tr. 121.) Counsel for appellant in his brief insists that the summons was not in proper form and that it could not be served in New York, without giving any real reasons therefor. It is true that the laws of Washington provide that the corporation may be served by filing the summons with the Secretary of State, where there is no person within the state upon which service can be made, but does not say that it must be so served, but in addition to this service the president of the corporation solemnly in writing filed in the Superior Court, acknowledges, "due and timely service." (Tr. 119. ) Certainly the president of a corporation can appear in Court and waive service of summons upon the corporation. The laws of the State of Washington provide for service of notice upon the defendant where a receiver is applied for, but it gives no form of notice or any provision for the service. Service was made upon the president of the corporation of the notice for the application of the appointment of a receiver. (Tr. p. 121.) The president of the corporation in a writing filed in said Court, acknowledged "due and timely service" of the notice. The Sunset Copper Mining Company had notice of this application and its president admitted due service. Is it to be said that if a president of a corporation goes into Court and files an acknowledgment that the corporation had been duly served with summons and complaint and notice of an application, that that is to be held for naught? If that be true it opens the way for fraud upon litigants. Counsel for appellants insinuates that

something very wicked must have been planned because the manager and trustee who lived in Washington was not served with the summons and with the notice of application for the appointment of a receiver. We think that counsel would find something to complain of whatever method had been pursued. If the manager had been served he would have seen "collusion" in that. The manager was Judge of the Superior Court; he was a creditor of the Company, and counsel would have insisted that service should have been had upon the officers of the Company who did not stand in that relation. No doubt because Black was Judge of the Superior Court and also manager of the corcorporation and also a creditor it was thought that some criticism might be made if served upon him and therefor direct notice was given to the president of the corporation. It cannot be claimed that there was any attempt at any rate to keep the corporation itself from having full knowledge of the proceedings. There could be no moral turpitude even if there were some legal defect in serving the summons upon the president of the corporation instead of upon the general manager who was a creditor of the Company. We think it is entirely immaterial whether the service upon the president was proper or improper. The general manager of the Company did employ D. W. Locke, an attorney, to make a defense. He certainly did appear in the action and while counsel spends a good deal of time and cites many authorities to the effect that an unauthorized appearance by an attorney does not give the Court jurisdiction, he overlooks the fact that there is nowhere any testimony that D. W. Locke, who appeared as attorney for the defendant, was not duly authorized. He was em-

ployed weeks before the case was tried. (Tr. 96.) He says he looked after that case "just as carefully as any other case that was put in my hands." He says when he was retained he was simply told to represent the mining Company. (Tr. p. 95.) He says that he examined the records of the Company and investigated whether or not the trustees had authority to execute the mortgage and he appeared on every important hearing had in the case afterward. Surely in the absence of proof that he was not authorized and in face of the evidence that he was employed by the manager of the Company the authorities cited by counsel for appellant are not in point.

The evidence shows that Mr. Locke was employed by the trustee and manager of the Company to act for the Company and that he did so. He made a formal general appearance and appeared on every occasion that it was necessary or proper for an attorney to appear. Appellant's witness, Fogarty, testified that Locke made more than one appearance in court. (Tr. 97, 98.) We think it unnecessary to cite any authorities to show that a general appearance cures any defects, if there were any, that were made in the service of summons. In addition to the foregoing we want to call the Court's attention to the fact that the Court recited in its order appointing a receiver, that

> "Due and legal service of this application, together with a true copy of the summons and complaint here, and of the affidavit used upon this hearing, have been duly served upon the defendant, the Sunset Copper Mining Company." (Tr. 125.)

The presumption is that that is true until that presumption is overcome by testimony. Where Courts make such findings in a case where a defective summons or service may appear in the records, the presumption is that other due and proper service was made in the absence of evidence to the contrary. The transcript nowhere recites that the summons set up in the transcript was the only summons and the only service in the action. The transcript instead of purporting to be a complete transcript of the suit in Superior Court shows that it only claims to show excerpts of exhibit B. (Tr. 114.) In addition to this, however, stockholders made a general appearance in the action for themselves and other stockholders. (Tr. 159.) Surely if there was a defective summons, or if it was served at an improper place the appearance by counsel and the general appearance by stockholders, would certainly cure such a defect. When the Court recited there was due service made, in the absence of proof to the contrary this Court must presume there was proper service.

We contend that the recital in the judgment of the Superior Court that due and legal notice of this application together with a true copy of the summons and complaint herein and of the affidavit used in the hearing have been duly served upon the Sunset Copper Mining Company, cannot be attacked collaterally.

In view of the recital the presumption of law is that other records justified the Court in making the finding.

> "This is in consequence of the great sanctity attached to judicial records by the common law and their uncontrollable verity."
>
> Black on Judgments, Sec. 273, Vol. I.

"A defect in the form or matter of the summons or other process not absolutely destructive of its validity * * * although material and sufficient to cause the reversal of the judgment on a proper application, does not deprive the Court of jurisdiction and therefore does not expose the judgment to collateral impeachment."

23 Cyc. 1075 d.

This is the rule as to judgments of Superior Courts where the defendant is resident within the jurisdiction of the court. Otherwise when the defendant resides out of the state.

Galpin vs. Page (cited by appellant) 18 Wallace, 350.

"A judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void and cannot be questioned in a collateral proceeding."

Black on Judgments, Sec 223, p. 271.

"Although there may be a defect in the notice such as to render the subsequent judgment irregular there will not be such a want of jurisdiction as to make it void."

Same Section.

See also Black on Judgments, Sec. 224.

The presumptions of law all favor the verity of the judgment and of all recitals therein and of the jurisdiction.

Many Courts go further and refuse to permit an attack on judgments by showing no notice of any kind was served upon defendant where there is recital that he was so served.

23 Cyc., 1075.

In the case at bar a summons was served and the president in writing admitted "due and timely" service.

Counsel for appellant makes much of the fact that notice of the application for the appointment of a receiver states that application would be made on December 9, 1908, whereas the record shows the receiver was appointed on Dec. 10, 1908. (Appellant's brief, p. p. 29, 30.) The only excuse for his argument is based on the misquotation of the record. The notice says the application will be made "on the 9th day of December, 1908, at 9:30 a. m., or as soon thereafter as counsel can be heard." (Tr. 121)

Appellant, however, throughout his brief ignores or garbles the evidence in order to make his argument and where there is not the slightest evidence to sustain him, bases his argument on mere surmise. In view of this record we do not feel it necessary to refer to his authorities or cite others. If the notice did not recite "or as soon thereafter, etc.," we hardly think any Court would hold that the jurisdiction was lost merely because the Court was not able or did not take up the matter at the exact time mentioned in the notice. Suppose, for instance, the Court had not reached the case at 9:30 and reached it at 9:45, would anyone seriously claim that the Court lost jurisdiction? The records show Judge Black was disqualified and

that Judge A. W. Frater, of Seattle, heard the matter. The inference would be that when the case was called Judge Black declared his disqualification and another Judge was called in from another county as Judge Black was the only judge in Snohomish county.

Before the case came on for trial in the lower Court and upon demurrer of Black, while the demurrer does not appear in the transcript, appellant formally amended his Bill by striking therefrom that portion asking that the proceedings in the Superior Court be declared void. (Tr. 23.) We maintain that as this was not urged in the lower Court and on his own motion abandoned, he cannot urge it for the first time on appeal. We insist, however, that it is inconsistent with his entire action. He is seeking to have Black and Bell declared to hold title as trustees for the benefit of stockholders. Surely this cannot be done if Bell and Black have no title.

The whole tenor of appellant's contention in these respects is, that no title, legal or equitable, in the property of the corporation purported to have been conveyed to appellees Black and Bell by the receiver, ever vested in them. The title, therefore, must still be in the corporation, or, if the corporation is defunct, in its trustees. We have, therefore, the analogous position of the appellant urging in one breath that the appellees have no title, and in the next asking the Court to declare that Black and Bell hold the title in trust for the corporation and its stockholders. If appellees Black and Bell have no title, it is elementary that there can be nothing upon which a trust can be imposed and appellant's suit is an invitation to this Court to

do a "foolish, vain and idle thing" by saying in effect to the appellees "though as a matter of fact you have no title whatever to the property in question, nevertheless you do have title, and a constructive trust will be imposed upon it."

A careful examination of the authorities has failed to disclose a single instance where a constructive trust has been imposed where the title was denied by the appellant.

Beach in his work on trusts and trustees, speaking of implied trusts, says:

> "In the establishment of trusts of this class, the end sought *is the separation of the legal and equitable estates.* The legal title is held by the trustee for the benefit of the equitable owner who is regarded as the real owner and as such rightfully receives the legal title by conveyance."
>
> 1 Beach on Trusts and Trustees, page 72.

The authorities cited in appellant's brief to the effect that judgments rendered on an unauthorized appearance by an attorney can be inquired into collaterally have no bearing on the facts. There is certainly no evidence that Locke was not authorized, but the contrary appears. (Tr. 95.) He was employed by the general manager of the Company. In the absence of any evidence to the contrary the authority of an attorney who appears in an action is presumed. The authorities cited by appellant in his brief p. 28 assert this doctrine and we know of none to the contrary. Counsel for appellant did not attempt to call the Court's attention to a word of testimony tend-

ing to show that Locke was not duly employed. The only fault he finds is that Locke was employed and that as the manager thought there was no defense it was not necessary to employ an attorney. The assertion in appellant's brief that Black employed Sandidge as attorney for Bell is based on no testimony in the case. Counsel makes much of the fact that Black was judge of the Superior Court and manager and trustee of the corporation and called in other judges to hear the case; approved a judge *pro tempore* selected by attorneys for the parties and employed counsel to defend. Certainly no one can read the evidence and come to any other conclusion than that Black acted with the greatest propriety and was careful to avoid all proper criticism, because he was judge and was interested he called in other judges to hear the case. He called in three judges and counsel complains of this. The evidence shows that there were numerous hearings between December and April and judges in that part of the state were difficult to get and the court stenographer was authorized to obtain such judges as could come. (Tr. 106.) But, say counsel, why three? If one had been selected to attend all hearings we would have counsel insinuating that Black secured a judge he could use and influence. He would be saying why did he not call in other judges instead of always having the same one. He does not suggest that in any of the proceedings the judges did anything that was not proper or not in accordance with law. Counsel cannot and does not point to anything that the judges did that any other judge would not have done. Counsel complains that Black as judge of the Superior Court approved the selection of a judge *pro tem.*

> Rem. & Bal. Code of Wash., Sec. 40, says: "A case in the Superior Court of any county may be tried by a judge *pro tempore*, who must be a member of the bar agreed upon by the parties litigant, or their attorneys of record, approved by the Court and sworn to try the case."

Counsel when he complained that Judge Black approved the selection made by the attorneys must have known that the judge *pro tem* would have had no power to act unless he was approved by the judge of the Superior Court. (Tr. 106, 130, 131.) We wonder if counsel thinks he is entirely fair with the Court. Black being judge and also trustee, although he knew of no defense, acted wisely in employing an attorney to defend in order to avoid criticism. We are sure that if he had not done so counsel for appellant would now be claiming that he should have done so. But, say counsel, Black employed the attorney for plaintiff. The uncontradicted evidence is exactly the opposite. (Tr. 109.) Black and Bell "locked horns" over the question of the foreclosure of the mortgage. Bell wanted to bring suit. Black opposed it and threatened Bell to make it very expensive. He asked for time and promised if time was given not to make proceedings expensive. Time was given, when it expired and Black could do nothing to raise money Bell wrote Black to give him the name of an attorney who would be inexpensive. Bell was a lawyer and prepared his own papers. Black gave him the "name of Sandidge among others." Bell had met Sandidge and remembered him and employed him. (Tr. 109.) Black was merely courteous because he had forced Bell to give him time

to protect the property of the corporation. There could be no wrong in this. Black was a creditor and a stockholder and it certainly was not his duty to make the proceedings expensive for himself as well as the corporation. Black had the moral as well as the legal right to have joined Bell in asking for a receiver in order to protect his claims if he had desired to do so. We contend that instead of doing wrong, as merely hinted by counsel for appellant, Black acted with wisdom and discretion. He was judge it is true, but he did not act in the case. He was a creditor and a trustee, but he employed an attorney to defend. He was manager and service could have been made upon him. Bell caused service to be made upon the president. If service had been made upon Black appellant would now claim that this was done to conceal the bringing of the action from the president and eastern stockholders who had strained relations with Black and to prevent a defense. It is quite evident that Black did everything that anyone could do to avoid just criticism. The Honorable Judge of the District Court truly was justified by the evidence when he found that Black was guilty of no act either "of commission or omission" which did or could injure the Company. (Tr. 80.)

## POINT VIII.

In regard to Point VIII we desire to specifically call attention to some of the findings of the lower Court as set forth in its decision.

> "The Sunset Mining Company is a corporation organized under and by virtue of the laws of Wash-

ington with its principal place of business at Everett." (Tr. 75.)

"The majority of the trustees of the defendant company during the time material to this inquiry lived at Glens Falls, New York, where the majority of the stock of the company was held." (Tr. 75-76.)

"W. H. Baldwin appears to have been the dominating influence by reason of his large stock holdings. Defendant Bell is a lawyer and was the legal adviser of W. H. Baldwin and Ella Baldwin, his wife, and for a time was general attorney for the defendant corporation. He never acted as trustee for the defendant company except for one day in 1904. At this time it seems to have been necessary to enable the company to transact some business to fill a vacancy on the board, and he was elected and continued a trustee for one day. Defendant Black was not present at this meeting and it does not appear that he knew anything about it. On August 3, 1904, the employment of Bell as attorney for the defendant company ended, although thereafter he attended to some legal matters for the company under special employment." (Tr. 76.)

"The Baldwins advanced and loaned to the defendant company from time to time $29,384.10, and on February 10, 1905, a mortgage was given by the defendant company to Ella Baldwin to secure the payment thereof. The defendant Black advanced to the company, December 26, 1906, for the purpose of doing its assessment work, $1,500, and a mortgage

to secure the repayment was thereafter made upon the company property to Black." (Tr. 76.)

"On March 18, 1907 (evidently 1909), Rudibeck, a stockholder, filed an affidavit on behalf of himself and other stockholders and attacked the indebtedness and charged fraud and collusion. The claims were approved by the Court and ordered paid, the property was sold March 20th to W. W. Black and F. L. Bell, and on March 29th Rudibeck filed protest and objection to the confirmation of the sale. On March 30th L. T. Reed, a stockholder, filed objection to the confirmation of sale. Objection to confirmation was based in substance on the same grounds upon which relief is sought in the complaint." (Tr. 78.)

"There is no evidence before the Court that there was any collusion between the defendants Black and Bell with relation to any of the conduct of the business of the defendant company, nor is there any evidence before the Court to justify the conclusion that either the defendants Black or Bell had any influence over the board of trustees or exercised any undue influence of any character in any of the proceedings referred to in the complaint. There is no evidence before the Court that any information with relation to the conditions or status of the defendant company's property was at any time withheld from the plaintiff. By the evidence it is shown that the plaintiff was at all times advised of the financial condition and status of the defendant company, knew of every act and thing that was done by the board

of trustees, and that he was advised more than a year prior to the institution of the foreclosure action that the company was without funds and he was requested to contribute as a stockholder to the fund in connection with the other stockholders for the purpose of relieving the financial stress of the defendant company and doing the assessment work, and he declined to contribute anything and stated that none of the stockholders would contribute. The plaintiff requested the defendant Bell to foreclose his mortgage more than a year prior to the time when foreclosure proceedings were instituted, and that he be given an opportunity to sell the property. He also asked the defendant Black to use his influence with defendant Bell to secure a foreclosure." (Tr. 78-79.)

"Defendants Black and Bell since acquiring the property have expended in assessment work on the mining claims approximately $25,000. There is no direct evidence before the court as to the value of this property as mineral land." (Tr. 79.)

"There is no evidence presented which would justify any court in finding that there was any manipulation of the defendant company's property by the defendants Black and Bell, which injuriously affected it. So far as the evidence disclosed there was no act of commission or omission on the part of either of said defendants which was intended to or did injuriously affect the defendant company." (Tr. 80.)

Counsel attempts to assign error as to "collusion" (Assignment I), but that is not broad enough to assign error to the finding that there was no act, etc., "intended to or did injuriously affect the defendant company." It can surely be said that appellant did not specifically assign error to the foregoing findings. If he did not he cannot now object and the findings surely sustain the judgment of dismissal. These findings are binding upon the parties on appeal.

These findings are also fully sustained by the uncontradicted testimony as shown by the transcript pp. 92-111.

## POINT IX.

The chief case cited by the appellant as an authority denying the right of defendants Black and Bell to purchase the property at the receiver's sale is Coombs vs. Barker, et al, 74 Pacific, 1. This case is clearly distinguishable from the case at bar. In that case the directors had allowed judgments to go against their corporation and its property to be sold at execution sale without making any effort to borrow money to redeem, and without giving the shareholders an opportunity to raise money to pay its obligations. Upon the other hand, one of the directors individually, and the others inferentially, discouraged the shareholders from making any effort toward redemption. They allowed the period of redemption almost to expire, when one of the directors, as a creditor of the company, brought suit two days prior and had judgment entered against the company two days prior to the expiration of the perior of redemption, and then

used that judgment as a basis upon which to redeem from execution sale, said redemption being made for the benefit of four of the directors, who afterward formed a new corporation which took over the title thus gained and worked the mine at a great profit, the facts being in every equitable element different from the case at bar, but in its opinion the court clearly and explicitly gives its assent to the doctrine for which we contend. The court uses the following language:

> "Counsel for defendant directors cite many cases to the proposition that under certain circumstances the directors of a corporation may become its creditors and enforce their claims against the corporation as any other creditors. We have no inclination to dispute this doctrine, but agree with it as being for the best interest of the corporation. This doctrine, however, is based upon a contract relation between the directors and the company whereby the debt is created and is allowed, because directors of a corporation are more familiar with the business and affairs of the corporation and its necessities than outsiders, and that it would be extremely unjust not to permit them to assist the corporation in financial troubles. When directors become creditors in this manner they may enforce their claims by the same methods as any other creditor.
>
> "Counsel further cites numerous cases holding that a director may become a purchaser of corporation property at a judicial sale when such sale is made by another creditor, and when the director has no control over the proceedings.

> "We also agree with this doctrine subject to the qualification, however, that the acts of the director must be fair and honest, and he be not permitted to obtain any dishonest advantage over the corporation or shareholders."

The rule, as above stated, with the qualifications, is the harshest rule contained in any of the authorities. Even by this, the harshest rule, Black cannot be held liable in this case.

The appellant's own case recognizes the right of Black to become the corporation's creditor in the above matter. It recognizes Bell's right to become a creditor, and it also recognizes their right under those circumstances to become purchasers at a judicial sale.

The court in Coombs vs. Barker, *supra*, seems to have placed its decision very largely upon the fact that the directors gave no explanation or justification of their conduct, using this language concerning them:

> "They sit by silently and say nothing, and this court, under the circumstances detailed, cannot say that their acts were bona fide and such as to maintain their position."

The next case cited by appellant, Fagan vs. Stuttgart Normal Institute, 127 Southwestern, 404, is clearly not in point, for in that case the defendant director had purchased the property of the corporation when he was not a creditor himself, and when his purpose was not to protect the corporation but to protect another creditor. As

between the corporation and a creditor certainly the duty owed by the director was to the corporation.

The case of Smith vs. Pacific Vinegar Pickle Works, 78 Pacific, 550, is not in point, for in that case the president of the corporation, whose actions are called in question without authority from and without the knowledge of the directors, endorsed the notes of the corporation to himself and then made statements to the directors which concealed from them the true facts. The decision in that case is based upon the fact that the president of the corporation was taking its notes and concealing the fact from the directors.

Neither is the case of Billings vs. Shaw, 103 Northeastern, 142, in point. In that case the defendant director secretly made an agreement with a third party holding obligations of the company, by which the director secretly secured a very great discount. The corporation by vote of all of its directors, thinking it was dealing with the creditor himself, and not with the defendant director, made a certain assignment in payment of the obligation. A large part of the consideration was then secretly obtained by the defendant director. This case holds, what no one will dispute, that the rule is plain that a director cannot sell his property to a corporation secretly so as to make a profit, nor can a director buy in the debts of a corporation at a discount and, without disclosing his interest, have the corporation pay him indirectly in satisfaction of the debt an amount large enough to give him a profit.

The case of Parsons vs. Tacoma Smelting Co., 25 Washington, 492, cited by appellant is not in point. In that case the directors of one smelting company had leased its property, to the injury of a minority stockholder, to another smelting corporation having substantially the same directors. Such a transaction is not in any of its elements analogous to the facts in the case at bar, because in the Parsons case the directors were by virtue of their office leasing to the injury of minority stockholders the property of their corporation, and not undertaking to continue the busienss of the corpoartion.

The case of Collins vs. Hoffman, 113 Pacific, 625, does not support appellant's contention. In that case the manager and secretary of a corporation purchased its real property at a delinquent tax sale when the corporation and its grantee were ignorant of both the nonpayment of taxes and the issuance of the certificate of delinquency. Until the corporation had an opportunity to pay the taxes and knew that the property was to be sold an officer of the corporation acting secretly as in this case, who became a purchaser under such circumstances, would suggest fraud.

THAT A DIRECTOR MAY BUY THE PROPERTY OF A CORPORATION AT A JUDICIAL SALE IS ESTABLISHED BY THE FOLLOWING AUTHORITIES:

> "In order to avail himself of the security which he may have taken for bona fide advances made to the corporation, a director may purchase property at a sale under the deed of trust, by which he is secured, or other judicial or public sale."

10 Cyc. 816.

See also Thompson on Corporations, Second Edition, Section 1253.

The leading case upon the right of a director to purchase, which is practically on all fours with the case at bar, except that the equities in favor of the appellees are much stronger in the instant case than in the one cited, is Twin-lick Oil Co. vs. Marbury, 91 U. S., 587. The second and third syllabi give an index to the case:

> "2. But one director among several may loan money to the corporation when the money is needed, and the transaction is open and otherwise free from blame, and he may buy at a sale under a mortgage given by it to him to secure the money loaned, if the sale was a fair one.
>
> "3. A bill to avoid such a sale must be brought within a reasonable time."

The following from the opinion in this case gives the reason that directors should be given an opportunity to protect their claims:

> "While it is true that the defendant as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame.

No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the extent to which it may safely be given."

Further quoting:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted; and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt."

The Court further lays down the principle, "that in an action to establish a constructive trust delay in bringing the action will defeat relief."

And the court in this case lays down the principle that in mining property a much shorter time will con-

stitute *laches* upon the part of the complainant than with property of stable and settled value. The reason of the rule is that the value of mining property is speculative and contingent. It is stated by the court in the following language:

> "While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them.
>
> "The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt."

The last paragraph recites the facts that are proven by the uncontradicted evidence in the case at bar.

In Saltmarsh and Others vs. Spaulding, et al, 17 N. E., 316, the court say:

> "A director of a corporation is not prohibited from lending it moneys when they are needed for its

benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure a payment of them invalid." Case cited.

"It is proved, as a fact, that the sale was made in good faith to the highest bidder, and that in making the purchase the tenants were in fact acting in good faith. The law does not require that from their relation to the company the contrary necessarily is to be implied."

17 N. E., 316.

The principle that a trustee purchasing corporate property at a receiver's sale is in a different relation to the company than if he purchased at an ordinary judicial sale, is establish in Janney, et al, vs. Minnesota Ind Expo., et al, decided May, 1900, and reported in 82 N. W., 934. The court said:

"The facts of this case bring defendant within the exception to the general rule that directors cannot purchase the property of the corporation for their benefit. The title, possession and control of the property were in the hands of an officer of the court (the assignee) and had been for nearly a year prior to the sale. The sale was made by direction of the court and subject to its confirmation. The plaintiffs had no control over the property or the assignee, who was the representative of the corporation, its creditors and its stockholders. They had no power

to prevent or control the one brought about by the court through its officers. They had material interests to protect by bidding at the sale. They purchased in good faith at the best price obtainable. The appellants had notice of the sale and did not object thereto until long afterward. See Pinkus vs. Linen Mills, 65 Minn., 40; 67 N. W., 643. The sale was fairly conducted and was confirmed by the court. There were twenty-one directors at the time besides the plaintiffs. These facts justify the conclusion of the trial court to the effect that the plaintiff in purchasing the property to protect their own interests did not violate their duties to the corporation." We cite to the same effect as the cases last quoted,

New Memphis Gas Light cases, 60 S. W., 206;

Wheeler vs. Abilene Nat'l Bank Bldg. Co., 159 Fed. 391.

Marks vs. Merrill Paper Mfg. Co., 188 Fed. 850.

Ryan vs. Williams, 100 Fed., 172.

Burnes vs. Burnes, 137 Fed., 781.

Cowell vs. McMellin, 177 Fed., 25.

Marks vs. Merrill Paper Mfg. Co., 203 Fed., 16-19-20 (Jan., 1913).

Harpending vs. Munson, 91 N. Y., 650.

Allen vs. Gillett, 127 U. S., 589-596.

Duncomb vs. N. Y. H. & N. R. R. Co., 84 N. Y., 190-208.

Leavenworth County vs. C. R. I. & P. R. R. Co., 134 U. S., 688-709.

## POINT X.

We know that no hard and fast rule can be laid down to govern a case of *laches*. Courts of equity are sometimes governed by the statute of limitations. If the court is governed by the statute of limitations in this case the action was properly dismissed. See statute of limitations, Transcript pages 11 and 112. Sometimes courts refuse relief in a shorter period than the statute will allow. Laches rest not alone on the lapse of time but on the inequity of permitting the claim to be enforced because of some change in the condition of the property of the parties. (Streets Fed. Equity Practice, Sec. 211.) In the instant case appellant knew all about the affairs of the company; knew the company was insolvent; knew that Bell had threatened receivership proceedings; knew that a receiver had been appointed; knew that the property had been bid in by Bell and Black and so knew before the sale was confirmed; he also knew that the property consisted of mining claims upon which it was necessary to do assessment work and to expend large sums of money in obtaining patents; he knew that appellees were spending large sums of money. Appellees had spent after the sale and during the time appellant was sleeping on any rights he had more than Twenty-five Thousand Dollars upon property that was admittedly not worth more than Forty Thousand Dollars. Buchler knew that this money would have to be spent in order to preserve the title. There certainly was a change in the condition and relations of the property and the parties.

Simpkins, a Federal Suit in Equity, 277.

16 Cyc., 150 and 157.

Denton vs. Baker, 93 Fed., 46.

Strand vs. Griffith, 144 Fed., 828.

Twin-lick Oil Co. vs. Marbury, 91 U. S., 887.

Townsend vs. Wandewircker, 160 U. S., 171.

Rothchild vs. Memphis & C. R. Co., 113 Fed., 476.

In this latter case the court held a delay of 17 months to be laches.

Thompson on Corporations, 2nd Ed., 1257.

Leavenworth County vs. C. R. I. & P. Rlwy. Co., 134 U. S., 709.

In this case Justice Harlan said:

"Courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance or even the want of means of those to whom they were once presented."

It must be remembered in this case that appellant knew or should have known that appellees were spending large sums of money and necessarily were forced to spend large sums of money in order to preserve the title to the property. See transcript, page 152, 153 and 154, where Bell notified stockholders of the condition of the property and the necessity to spend large sums to preserve title. See Buchler's testimony, transcript page 103, 105. "Exhibit 13," transcript page 176; "Exhibit 17," 179. See findings of the U. S. District Court, transcript, page 78.

## POINT XI.

The appearance in the receivership proceeding by Rudebeck and Reed, who were stockholders appearing for themselves and other stockholders, as well as the appearance by the corporation itself whereby substantially the things alleged in the bill of complaint were set up in the objections and the judgment of the court we think is *res adjudicata* of all the matters and things complained of by appellant. See Black on Judgments, Vol. 2, Sec. 549.

Willoughby vs. Chicago, etc., Co., 25 Atl., 277.
Hearst vs Putnam, 77 Pac., 753, 758.
Mitchell vs. First Nat'l Bk., 180 U. S., 471, 480.
McEwen vs. Harriman Land Co., 138 Fed., 797.
Intermela vs. Perkins, 213 Fed., 106, 108.
Green vs. Liggett, 135 U. S., 533, 544.

## POINT XII.

Appellant should have offered to put the defendants in the same position they occupied before they purchased at the sale, and should have offered to restore to them money honestly and necessarily expended by them in the preservation of the property since that time.

In Mosher vs. Sinnot, 79 Pacific, reading from page 744, the Court says

> "The complaint makes no offer to do equity with reference to Mosher and Whipple, nor does the decree make any provision for doing them equity. The

decree simply provides for a cancellation of the certificates of stock held by them under this purchase. The claims of Mosher and Whipple against the corporation are not disputed. They are open accounts. They accrued more than six years ago, and are therefore barred by the statute of limitations. Were we to affirm the judgments of the Lower Court as to these certificates of stock, we would thereby cancel the certificates of stock, and yet not put Mosher and Whipple in the same position in which they were before they received the certificates of stock, the corporation would have back the stock, and at the same time have annulled perforce the statute of limitations the claims of Mosher and Whipple against it. This result would be manifestly unjust. *The complaint failed to state facts sufficient to constitute a cause of action* in that it *failed to offer to do equity* with reference to Whipple and Mosher. The decree was bad in that it cancelled the certificates issued to Whipple and Mosher without requiring the corporation to do equity with reference to their claims."

To the same effect is the case of San Francisco Water Co. vs. Patee, Cal., 25 Pac., 135, whic his an action brought by the corporation in which the defendant was declared a constructive trustee, he having secretly purchased the property of the corporation at tax sales. The court in that case held that Patee was entitled to full payment for all expenditures incurred by him in behalf of the corporation in acquiring the title, although the title was acquired by him secretly. The court held, however, that as to prior claims for salary he would stand in the same

relation as other creditors.

In the case of Coombs vs. Barker, appellant's leading case, the Court said:

> "3. As to the amount of the recovery to which the plaintiffs are entitled: There is no doubt but that defendants are entitled to a credit for whatever money they have actually paid out or expended for the use and benefit of the defendant company—such as the money paid by them upon the redemption of the property, in satisfaction of bona fide claims against the property, interest thereon at the rate of eight per cent. per annum from the dates of payment, and also the reasonable expenses of extracting the ore from the property after redemption. The directors of the company, having the management of its business affairs, could have proceeded with the mining operations of the company and mined all this ore at the expense of the company. It is therefore inequitable to allow plaintiffs to recover the value of the ore after extraction, without allowing the defendants the necessary expenses of extraction."

The appellant must offer to do equity with reference to appellees or the decree of the court must make provisions for doing them equity

> "Unless the director purchasing the property has acted with such turpitude as to put him in the category of trustee *ex malefacio*, he will be allowed to keep or will have restored to him what he has actually expended. In other words the property will be re-

stored to the corporation on condition of putting the purchaser in *statu quo.*"

Mosher vs. Sinnott, 79 Pac., page 744.

San Francisco Water Co. vs. Pattee, 25 Pac., 135.

Wheeler vs. Abellene Nat'l Bldg. Co., 159 Fed. 391.

Burnes vs. Burnes, 137 Fed. 801.

We think the law is well settled that in every case in which a judicial sale is set aside that the purchaser must be placed in *statu quo*, unless he has been guilty of moral turpitude. The evidence in this case shows that the claims of appellees with interest amount to more than One Hundred Thousand Dollars, none of which has been paid. See transcript, pages 106, 110, 137, 138, 139, 140, 148 and 149. It is self-evident that appellees cannot be placed in *statu quo.* It would be a vain and foolish thing for a court to appoint a receiver for Forty Thousand Dollars worth of property when the claims of appellees would amount to more than One Hundred Thousand Dollars, and this would eventually result in giving the property to appellees finally, the only difference it would make is that the receivership would make large expenses, finally and practically coming to be paid by appellees without any benefit to any stockholder.

## POINT XIII.

The bill of complaint simply recites that the appellant is a stockholder and nowhere asserts that he brings this suit except to redress his own particular wrong. We think that the law is well settled that an individual stock-

holder in an action like this cannot maintain an action. The only authority for a stockholder to bring an action like this is where the corporation itself refuses to act, then a stockholder in behalf of himself and other stockholders similarly situated may maintain such a suit if due demand for suit is made upon and refusal had from the officers of the company.

Kavanaugh vs. Trust Co., 181 N. Y., 121, 124.

Carson vs. Allegheny W. C. Co., 189 Fed., 791.

If he does not bring the suit for himself and other stockholders he must make the other stockholders defendants.

Snow vs. Wheeler, 113 Mass., 179.

Carson vs. Allegheny W. C. Co., 189 Fed., 791.

## POINT XIV.

It seems to us that this proposition requires no extended argument. The Sunset Copper Mining Company was a necessary party to the action, and if for any reason it does not sufficiently appear from the transcript that the Sunset Copper Mining Company was not served in the action in the U. S. District Court then it follows that it is a necessary party on appeal and as no citation was served upon the corporation the appeal should be dismissed for that reason and we hereby ask the Court to dismiss the same.

Farmers' Loan and Trust Co. vs. Longworth, 22 C. C. A., 420.

48 U. S. App., 71.

76 Fed., 610.

Am. Loan and T. Co. vs. Clark, 27 C. C. A., 522.

49 U. S. App., 571.

Hook vs. Merc. T. Co., 36 C. C. A., 645.

95 Fed., 41.

Wilson vs. Kiesel, 164 U. S., 252.

Hardy vs. Wilson, 146 U. S., 179.

## POINT XV.

The action brought by Bell in the Superior Court of Snohomish County was not an action to foreclose a mortgage, but an action to have a receiver appointed, because the corporation was insolvent. This is directly authorized by the statutes of the State of Washington. See Rem. & Bal. Code, Vol. 1, Sec. 741, Sub. 5 and 6. See complaint transcript, page 115-118.

## POINT XVI.

It is sufficient as to this point to call to the attention of the Court the entire absence of any evidence tending to show any effort on the part of complainant at any time to aid the company or come to its assistance. The evidence disclosed the fact that the company was insolvent and had no assets and that money had been furnished by both appellees Black and Bell with which to preserve the property and that appellant was fully informed as to everything that was done. See transcript, page 106, and findings of Court hereinbefore mentioned.

## POINT XVII.

It is obvious that the complainant's remedy is the remedy available to the corporation, because a stockholder

can have no higher or greater right, remedy or interest than that of the corporation itself. This is so plain that we do not deem it necessary to cite authorities in support of the proposition. That a Federal Court of Equity will deny relief to a representative of a corporation as against a judgment rendered against it in the State Court, where such representative had timely notice of the entry of such judgment, is settled in this circuit in the case of Denton vs. Baker, 93 Fed., 46.

In the case cited a judgment was fraudulently obtained in a court of this state against a National bank without making the receiver thereof a party. The receiver learned of it a few days later, but took no action in the State Court to contest the judgment. After the expiration within which he might move in the State Court to vacate the judgment for fraud, he filed a bill of equity in the Federal Court, and it was held that he was guilty of laches and that equity would not annul the judgment.

## POINT XVIII.

In support of this point it is only necessary to refer to the decision of Judge Neterer (Tr. 79). The evidence supported his finding that appellant invited Bell to foreclose his mortgage nearly a year before the receivership action was instituted. His purpose in the invitation was that Bell might thereby obtain a title that would exclude all minority stockholders from any interest in the corporation, and that the appellant might himself then obtain an option that would give him a profit. (Tr. 109.) Appellant had theretofore secured an option on the majority stock and finding he could not handle it conceived

the idea that he could sell the mining property at a profit. (Tr. 109.) Appellant likewise solicited Black to the same effect (Tr. 106), the disposition of Black and Bell being to hold the property for the corporation and that of appellant being to get the property away from the corporation.

It is a fundamental principle of law that one cannot be heard to complain of any act which he himself invited. It appears to us that no citations or further argument are needed on this point.

## POINTS XIX, XX, XXI.

These three points have already been developed in the discusison of previous points. Point XIX was covered largely under the topic of "Laches," Point XX under VIII concerning the decision of the trial judge and IX treating of the right of trustees to purchase at a judicial sale to protect claims against the corporation, and Point XXI has been established in our belief by all of the preceding argument.

## DISCUSSION OF APPELLANT'S CHIEF ARGUMENTS.

The appellant in his brief bases his claim that the lower Court erred chiefly upon three grounds. The first, that there was no service upon the corporation and that the appearance of Attorney Locke in the action was unauthorized and that therefore there was no jurisdiction. Second, that the sale by the receivership was void because Bell in his prayer in addition to praying for a receiver and sale of the property also generally prayed for other

relief, including a foreclosure. Third, that the purchase by a director of a corporation at a judicial sale of the corporate property is void.

It seems to us that a careful reading of the statement of facts alone shows that appellant's contentions are baseless as he assumes a state of facts which did not exist, upon which to base his argument. The third leading point of appellant to the effect that the purchase by Black and Bell was void because Black was a trustee has been answered by our argument under Point IX in which the cases cited by appellant have been shown to have been decided upon a very distinct state of facts from the case at bar.

Answering Claim of No Authorized Appearance.

In regard to the effect of an unauthorized appearance by an attorney, the appellant in his brief at page 27 cites:

Shelton vs. Triffin, 6 How., 162, 186.
Hatch vs. Ferguson, 57 Fed., 959, 971.
Dormitzer vs. Germ. Sav. & L. Co., 23 Wash., 195.

He argues from these cases that Locke's appearance in the cause gave no jurisdiction. The cases cited by counsel have absolutely no bearing on the cause at issue. All of appellant's cases are to the effect that if the defendant was not served and gave his attorney no authority to make an appearance that the unauthorized appearance would not give jurisdiction. But the Sunset Company was served with summons and complaint upon the presi-

dent of the corporation, who admitted due and timely service and the Court's orders and decree recited due and regular service. Likewise Attorney Locke, as the evidence shows, was employed to appear for the company and did appear a number of times.

In the case of Shelton vs. Tiffin, 6 How., 162, cited by appellant, there were two defendants. The case was brought in Louisiana and one of the defendants was in Missouri. The attorney Perry authorized to appear for one of the defendants inadvertently appeared also for the defendant living in Missouri without authority. The Court says at page 184:

> "No process was served upon L. P. Perry of Missouri, nor does it appear that he had notice of the suit until long after the proceedings were had. * * * And Crawford, the attorney, testified that he had no recollection of having received any authority directly or indirectly from L. P. Perry or from any one in his behalf to defend the suit. * * * And he says that he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertance on his part. This evidence does not contradict the record, but explains it. The appearance was the act of counsel and not the act of the Court. Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted."

We call the attention of the Court to the fact that in this case cited by appellant it was held that a recital by the Court cannot be controverted.

The case of Hatch vs. Ferguson, cited by appellant, is merely to the effect that an unauthorized appearance for minor defendants does not bind them.

In the case of Dormitzer vs. Germ. Sav. & L. So., 23 Wash., 195, the Court decided at pages 201 and 202 that the defendant who was not within the state had never been served with process, and that the divorce was fraudulent because neither the plaintiff nor the defendant was domiciled in the state in which the divorce was given. The appearance of the attorney was an unauthorized appearance as far as the defendant wife was concerned. The decision of this case on appeal at 192 U. S., 125, did not take under consideration the matter of an unauthorized appearance by an attorney but decided that the divorce action was void because neither party was domiciled in the state where the divorce was granted.

The other cases cited by the appellant are likewise ones where no service was had and an attorney appeared without any authorization.

While it does not appear in the transcript the inference is clear that McNutt, president of the Sunset Copper Mining Co., asked Black to secure an attorney to appear in the action. And this inference is in conformity with the fact.

## CONCERNING JUDGE PRO TEM.

Appellant's brief at pages 20, 21, 22 and 23 concerns itself with the fact that Black as judge approved the selection of F. E. Anderson as judge *pro tempore*. No attempt is made by the appellant to prove that F. E. Anderson was not a proper and impartial judge nor was any

attempt made to show that he did not act correctly in the premises nor that this Court having the same case before it would not have acted exactly as did he.

Appellant on page 20 cites an extract from Sec. 40 of Rem. & Bal. Code and Statutes of Washington in an unfair attempt to make this Court believe that Judge Black's approving of the appointment of F. E. Anderson was not only a breach of propriety, but was also contrary to the laws of the State of Washington. The extract quoted occurs within Sec. 40, but that extract does not end with a period as cited by appellant, but that phrase ends with a comma and is immediately followed by this phrase, "approved by the Court." The counsel for appellant knew that Black was the only judge of Snohomish County and that he was required by law to approve the appointment of a judge *pro tempore*. The evidence in this case shows that the parties litigant in the Snohomish County proceeding by their attorneys did agree in writing as provided by law for the appointment of Anderson.

Answering Claim of Invalidity of Receivership.

The appellant contends the Court had no power to appoint a receiver and that the sale was void, in the face of appellant's attempt to apply a constructive trust upon the title of the appellees, and in the face of the fact that the Washington law provides for the receivership of a corporation because of insolvency or imminent insolvency.

The appellant in the Court below while first praying that the Snohomish County proceedings be declared

void later amended his prayer by striking out that portion (Tr. 23) and in a brief to the Court below, dated February 2nd, 1914, on page 15, which is incorporated in appellant's brief on final hearing before the trial Court appellant made this conclusive statement:

> "In the first place complainant is not demanding that the judgment entered in the Superior Court of the State of Washington for Snohomish County, be vacated, annulled and declared void. He is asking that a constructive trust be impressed upon the property in question in the hands of defendants, Black and Bell."

In defiance of appellant's amendment of his prayer below, and the assertions of his counsel orally and in brief in his behalf, appellant now contends that the Snohomish County Superior Court proceeding was void. Appellant, however, ignores the fact that the Snohomish County proceeding was an action brought for the appointment of a receiver upon the allegation that the Sunset Copper Mining Company was insolvent, owing a large amount in addition to the mortgage owned by Bell. And Bell, in that action, prayed that the receiver sell the property to pay not only his claims, but the claims of the corporation. The cause likewise was carried through as a receivership under the laws of the State of Washington, and Bell presented ihs mortgage merely as a claim against the receiver. This he had a right to do. The prayer for a foreclosure of the mortgage was merely a portion of a general prayer for other relief following the specific prayer for appointment of a receiver and the sale of the

property to pay the debts. The portion of the prayer concerning the foreclosure was merely verbiage and did not change the receivership proceedings.

Rem. & Bal. Code of the State of Washington, Sec. 740, provides:

> "A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the Court or officer may direct."

and Sec. 741 provides:

> "A receiver may be appointed by the Court in the following cases:
>
> "1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;
>
> "3. In all actions where it is shown that the property, fund or rents and profits in controversy are in danger of being lost, removed or materially injured;
>
> "5. When a corporation has been dissolved or in insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;
>
> "6. And in such other cases as may be provided for by law, or when, in the discretion of the Court, it may be necessary to secure ample justice to the parties."

The Court will note that the property of the Sunset Mining Company was largely chattel, consisting of machinery and unpatented mining claims, and the Supreme Court of the State of Washington has decided that in the foreclosure of a chattel mortgage the appointment of a receiver is proper and the receiver in the foreclosure proceedings may sell the property and pass title.

Libert vs. Unfried, 47 Wn., 182.

Collins vs. Gross, 51 Wn., 516, holds as shown by the syllabi that

> "1. A receiver may be appointed pending foreclosure of a real estate mortgage, where it appears that the mortgagors had abandoned the property and left for foreign lands and that a receiver is necessary to care for and protect the property and rent the same during the pendency of the action."

> "2. Bal. Code, Sec. 5516, repealing Bal. Code, Sec. 5456 in so far as it authorizes the appointment of a receiver for mortgaged real property because of insufficiency of the security, does not repeal by implications other provisions for the appointment of a receiver to save waste.

21 Wn., 32, likewise holds that a receiver is permissible to prevent waste.

Appellant, however, mistakes the law governing the remedies of a holder of notes secured by a mortgage. The holder of notes secured by either chattel or real estate mortgage, under the general rule and under the decisions

in the State of Washington, has his choice, either to foreclose his mortgage or else to treat the debt as an ordinary debt and sue on the claim.

Frank vs. Pickle, 2 Wash. Terr., 55, states in its syllabus:

> "If a written instrument constitutes both a promissory note and a mortgage, the holder, at his option, may recover a money judgment upon it, as a promissory note, or proceed to foreclose."

Frye vs. Meyer, 22 Wn., 277, likewise holds that the holder of note and mortgage may, at his option, treat the same as an ordinary debt, or may foreclose the mortgage.

In the Superior Court case of Bell vs. Sunset Copper Mining Company, complained of by appellant, Bell saw fit to present his notes and mortgage as a claim to the receiver as he had a perfect right to, instead of foreclosing his mortgage and cutting out other creditors. In fact Bell suffered his claim, secured by a mortgage, to be adjudged subsequent and inferior to claims of other creditors.

None of the cases cited by appellant concerning this point are applicable, as they are merely to the effect that under certain conditions when the action is entirely a real estate mortgage foreclosure that a temporory receiver cannot be appointed in order to apply the rents to increase the security.

Appellant's case of Norfor vs. Busby, 19 Wn., 450, is solely to the effect that a receiver cannot be appointed in a straight mortgage foreclosure on real estate to deprive the mortgagor of the rents before foreclosure to make up an insufficiency of security. In the case already cited by appellees, to-wit: Collins vs. Gross, 51 Wn., 516, the Court held that the case of Norfor vs. Busby, 19 Wn., 450, only decided that a receiver cannot be appointed to take charge of property before the foreclosure so as to apply the rents to make up an insufficiency of the security. The Court in Collins vs. Gross stated that:

> "The appointment of a receiver to care for, protect and rent the property during the pendency of the foreclosure proceedings" was authorized to prevent waste.

It appears to us that appellant's contention that a receiver cannot be appointed in the action by Bell in Snohomish County in which he prayed for the appointment of a receiver for the purpose of preventing waste and on account of the insolvency of the company, and that the receiver should sell the property to pay the debts, is neither supported by authroity nor reason. And appellant's contention in this respect is certainly academic fir if sustained it could only defeat his action to establish a constructive trust upon a title which he now seeks to say does not exist.

The deciding feature that the receivership proceedings in the Snohomish County Court was proper and as provided by law, and that the receiver's sale of the corporate property passed title to the purchasers, is the

fact that the Sunset Mining Company was alleged in the complaint to be insolvent and the proof in the Snohomish County proceedings was to the same effect, and the Superior Court of Snohomish County on a hearing adjudicated the insolvency of the Sunset Copper Mining Company. In addition the evidence produced in this case in the District Court before Judge Neterer likewise proved that the Sunset Copper Mining Company was insolvent and that its debts exceeded its assets by a very considerable amount.

The appellant's brief at page 38 seeks to mislead the Court as to the prayer of Bell in his Snohomish County proceeding insinuating that the only prayer of appellee Bell was that a receiver *pendente lite* be appointed to care for the property until the sale of the premises under the mortgage. In the transcript, however, page 118, occurs the following extract from the prayer of Bell's action:

> "and that the receiver be authorized and directed to sell the whole or such portion of said property as may be necessary in order to pay the indebtedness of said company," and "and for the payment of all debts and obligations of said company or of the receivership,"

Irregularities Not Important on Collateral Attack.

We wish to call the attention of the Court to the fact that all of the alleged irregularities complained of by appellant, would, if true, be merely such irregularities as would permit an Appellate Court on appeal in the same proceeding to modify the decree if it saw fit. But none of the established irregularities, evin if established, are such as to allow collateral attack upon the judgment in another

proceeding. It would seem to us that appellant having been guilty of most glaring errors and irregularities in not having served the Sunset Mining Company in this action nor made it a party to the appeal would be reluctant instead of anxious to try his cause upon the most precarious of technicalities.

Regarding Laches and Limitations.

Appellant in his brief, pages 63-70 inclusive, argues that the Federal Equity Courts are not bound by State Statutes of Limitation. But while the Federal Equity Courts are not bound they are prone to follow same by analogy. To this effect we cite:

Simpkins, a Federal suit in equity, 277.
Merrill vs. Town of Monticello, 66 Fed., 165.
Cooper vs. Hill, 94 Fed., 522.
Beaubien vs. Beaubien, 23 How., 190.
25 Cyc., 1155-1165.

The Statutes of Limitation of the State of Washington affecting this action are shown in the transcript pp. 111, 112. Appellant's brief, page 69, states that Sec. 159 of R. & B. Code of Washington provides for the bringing of an action based on fraud within Three years. Said Sec. 159 reads as follows: —

"Sec. 159. Within three years. * * *

4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the

> aggrieved party of the facts constituting the fraud."

It clearly appears that the said action must accrue within the three years discovery of the real fraud, not within three years after the confirmation of a sale. Appellant's testimony, Tr. pp. 104, 105, shows Buchler to have knowledge of all the things complained of long before the confirmation.

The cases hereinafter cited, however, by us, conclusively show that an action to impress a constructive trust is not an action for relief based on fraud. The Washington Statute of Limitation applying to the instant case is Sec. 165 of Rem. & Bal. Code and Statutes, reading as follows:

> "Sec. 165. ...
>
> An action for relief not hereinbefore provided shall be commenced within two years after the cause of action shall have accrued."

... The Federal Courts of Equity follow by analogy the state statute. Of course, in the case at bar, no extraordinary conditions exist. Black especially fulfilled his every obligation, and the closest scrutiny of his acts shows that he was at all times endeavoring to his utmost to protect the interests of the minority stockholders, and that instead of being the controlling factor of the corporation, that he was at all times a minority stockholder, never having more than eighty thousand (80,000) shares of stock, and that the Baldwin stock saw to it each year that a majority of the trustees resided in New York. Had Black contented

himself with a mere fulfillment of his obligations to the corporation and the minority stockholders, the property and assests would have been lost to the corporation, and the stockholders, many years prior to 1909. And so if there be any reasons for this Federal Court sitting in equity, not following by analogy the State Statute of Limitations, it would be, as certain of appellant's citations suggest, that the court would hold that a delay of a shorter period than that stated by the statute, would bar relief.

If complainant's action be one to annual and vacate a judgment of the Snohomish County Superior Court, it would appear that the one year statute is applicable according to the decision of Denton vs. Baker, 93 Fed., 46. The authorities are conclusive that an action to establish a constructive trust is not an action for relief on the ground of fraud, but is such an action as would come within the language of Section 165, Rem. & Bal. Code of Washington, holding actions for relief not otherwise provided for, barred within two years. In support thereof we cite:

Wagner vs. Law, 3 Wash., 517.

French vs. Woodruff, 54 Pac., 1017.

Missouri Savings and Loan Co. vs Rice, 84 Fed., 131.

Ferris vs. Wirt, et al, 66 Pac., 946.

Chapman vs. Bank of Cal., 31 Pac., 896.

Keney vs. Parker, et al, 79 Pac., 556.

Hecht vs. Slaney, 14 Pac., 88.

Piller vs. Southern Pacific R. Co., 52 Cal., 42.

The California cases, the last five, are construing Section 343 of the California Code, which reads as follows:

> "An action for relief not hereinafter provided for must be commenced within four years after the cause of action which have accrued."

The tenor of the above cases is to the effect that actions to establish trusts are not actions for relief upon the ground of fraud.

It is patent that an action to establish a constructive trust comes within the purview of the two-year statute for other relief, as there is no other statute of limitations touching upon such an action.

It appears that more than three years elapsed between the sale to Black and Bell and the bringing of appellant's action. We respectfully submit that appellant's cause of action is stale; that the Court should deny him any relief, because of laches, and that the two-year statute of limitations should be applied as a bar by analogy.

## CONCLUSION

In conclusion we deisre to call the Court's attention to the fact that this is a suit in equity. An Equity Court is for the purpose of giving relief from the harsh and rigorous technicalities of the law instead of resorting to technicalities to defeat justice and one of the governing principles is that, "He who seeks equity must do equity."

The evidence discloses that the appellant, Buchler, had every opportunity to examine the books and records

and he exercised that opportunity, purchasing an option on the controlling stock interest and on the mortgage debts of the Company which Bell afterward presented to the receiver in the receivership proceeding. Appellant and all other stockholders had an opportunity of relieving the financial distress of the Company by loaning to the Company their pro rata of the expenses for doing assessment work and patenting the claims; Bell and Black agreeing to forbear pushing their claims for advances previously made. Neither he nor any other stockholder would do anything to protect their interest. After the sale had been confirmed appellant and other stockholders were given an opportunity by Black and Bell to join with them in the ownership of the property by paying their pro rata of the sum bid by Black and Bell. Neither would they do this.

There is no evidence as to the value of the mining property and from all the evidence offered it would seem unprofitable to mine ore. So that it appears that even now, after appellees had spent $30,000.00 additional after the sale, the value of the property is still speculative and there is no indication that it could be sold for $40,000.00 now, much less $110,000.00, which is the total investment of appellees in holding and improving and doing the work connected with patenting the property.

In the face of this, appellant Buehler, who would do nothing to assist in saving the property, who is estopped by solicitation of the act he complains of, who is guilty of laches, and who openly disclaims any intention of doing equity through remunerating appellees for necessary expenditures, seeks now in this Court of Equity to add a fur-

ther burden in the form of a large attorney fee in this cause together with the cost of a receiver and counsel fees connected therewith and make same a first and prior lien on this property. To sustain appellant's position will neither profit him nor any other stockholder and will only injure appellees through wasting the property in attorney and receiver fees.

Appellees are the only people who tried to and who did protect the property. They went far beyond the requirements in preserving the property for the corporation and stockholders, and when their means would no longer permit them to carry the corporation, and when the sale had been made and confirmed, instead of attempting to freeze the stockholders out, they did what the law did not require them to do and what no other person probably would have done under the circumstances, giving the stockholders a right to put up their share, not of the whole debt, but of the bid.

An Equity Court under such circumstances will not give the property substantially to attorneys for the appellant, especially when the appellant has never done anything to aid but always to annoy and make trouble.

The matter involved in this action is all *res adjudicata;* appellees had the right to purchase the property to protect bona fide advances; the equities are with Black and Bell; and appellant is barred by laches, estopped by solicitation, and stating an intention to do inequity in effect evicts himself from a forum of Equity. In addition appellant's action and appeal are fatally defective because

of his failure to make the corporation a party by service and by ignoring the corporation on this appeal.

Appellant does not rely upon equity but wholly upon the harshest kind of technicalities, and as we have shown in our brief one not sustained by any facts in the cases cited by them.

We submit that this Court should, without any hesitation whatever, dismiss the appeal at the cost of appellant.

Respectfully submitted,

W. W. BLACK, for himself, and

ROB'T. McMURCHIE and

L. L. BLACK,

Solicitors and Counsel for

Appellee Black.